

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 01-167

Authority of Governmental Entities to Audit the Metropolitan Nashville Airport Authority

QUESTIONS

1. Does the Metropolitan Government of Nashville and Davidson County, Tennessee, have a responsibility to audit the accounts and financial records of the Metropolitan Nashville Airport Authority (MNAA) and, if so, is there authority through which the Metropolitan Government may meet this responsibility?
2. If the Metropolitan Government does not have a responsibility to audit the accounts and financial records of the MNAA, is there any other governmental agency with oversight responsibility and authority to audit such records? If so, which governmental entity or entities?

OPINIONS

1. Yes. The Metropolitan Government does have the responsibility and authority to cause an annual audit of the accounts and financial records of the MNAA.
2. In addition to the Metropolitan Government, the Comptroller of the Treasury of the State of Tennessee, the Tennessee Department of Transportation, and the Federal Aviation Administration all have the responsibility and authority to audit the accounts and financial records of the MNAA if certain conditions are met.

ANALYSIS

This Office has been requested to consider the authority of the Metropolitan Government of Nashville and Davidson County (Metro) to audit the MNAA, as an aid to determining whether statutory changes should be recommended. Our analysis of the questions posed is as follows:

The responsibility and the authority of Metro to audit its agencies and departments are found in at least two sources. The Metro Charter, which was enacted pursuant to state law and governs all Metro agencies, provides in § 6.15 that:

The council shall provide annually for an independent audit of the accounts and other evidences of financial transactions of the metropolitan government and of its every department, office and agency . . . [and that]

The council may at any time order an examination or special audit of any department, office or agency of the government.

Section 8.103 of the Charter also provides that:

The director of finance or his designated divisional director shall:

(g) Periodically inspect and audit the accounts and records of financial transactions maintained in each department, office and agency of the metropolitan government.

The Tennessee Code addresses the audit issue in Tenn. Code Ann. § 6-56-105(a) which provides that:

(a) The governing body of each municipality shall cause an annual audit to be made of the accounts and records of all departments, boards, and agencies under its jurisdiction which receive and disburse funds. The audit shall include, but not be limited to, general funds, highway funds, school funds and public utilities.

Thus, to determine whether the MNAA is subject to audit by Metro, one must first determine if the MNAA is an agency of Metro Government.

The MNAA was created by Metro pursuant to the Metropolitan Airport Authority Act (the Act). Tenn. Code Ann. §§ 42-4-101, *et seq.* (2000). All airport authorities created pursuant to the Act, including the MNAA, derive their powers from the Act and are declared therein by the General Assembly to be “public and governmental bodies acting as agencies and instrumentalities of the creating and participating municipalities.” Tenn. Code Ann. § 42-4-102(a) (2000). Thus, the Act clearly states that the MNAA is to be considered an agency and instrumentality of Metro, the creating municipality. *Id.*

In addition to that clear declaration in the Act, this Office has previously determined that the MNAA is an agency of Metro Government. Op. Tenn. Att’y Gen. 88-27 (Feb. 2, 1988). This Office has opined that a local housing authority established pursuant to the Housing Authorities Law, much like the MNAA is created pursuant to the Act, is an agency and instrumentality of the creating municipality and is therefore subject to audit by the Comptroller pursuant to Tenn. Code Ann. § 6-56-105. *See* Op. Tenn. Att’y Gen. 80-510 (Oct. 29, 1980) and Op. Tenn. Att’y Gen. 89-102 (Aug. 16, 1989). The 1980

Opinion was based upon a Tennessee Supreme Court ruling stating that the Knoxville Housing Authority is an agency and instrumentality of the City of Knoxville. *See Knoxville Housing Authority, Inc. v. City of Knoxville*, 174 Tenn. 76, 123 S.W.2d 1085, 1088 (1939). The Court looked to several aspects of the housing authority that are similar to the structure of the MNAA, including its creation by the municipality and the appointment of its commissioners by the mayor. *Id.*; Tenn. Code Ann. § 42-4-104 (2000); Tenn. Code Ann. § 42-4-105(a)(1)(E) (2000). Housing authorities are also typically funded by federal grants much like the MNAA. In addition to these factors, the Mayor of Metro or the mayor's designee sits on the MNAA board of commissioners. According to information provided to this Office in the Opinion request, Metro, pursuant to contract, continues to give a portion of its *ad valorem* tax revenue from airline property of certified air carriers to the MNAA for land acquisition. Also, Metro or any participating municipality has the option to guarantee bonds of the MNAA, although it is the understanding of this Office that such a guarantee has not been made to date. Tenn. Code Ann. § 42-4-105(a)(1)(B) (2000); Tenn. Code Ann. § 42-4-109(e) (2000). Even without these additional factors, the structure of the MNAA and the structure of the housing authorities referred to in the Opinions cited above are extremely similar. So similar are they in fact that it logically follows from the reasoning of the Tennessee Supreme Court, our previous opinions, and the declaration of agency status in the Act, that the MNAA is an agency of Metro and thus Metro has the responsibility and the authority to cause an annual audit of the MNAA to be made pursuant to § 6-56-105 of the Tennessee Code and §§ 6.15 and 8.103(g) of the Metro Charter.

Being an agency of Metro, the only way that the MNAA would be exempt from audit by Metro is if the Act provided that the MNAA is not subject to such audit oversight. The General Assembly could have accomplished such an exception by inserting an express provision exempting the MNAA from audit by Metro or by granting the power of audit oversight to the MNAA and the MNAA alone. Neither of these things, however, was included in the Act. What the General Assembly did provide in the Act is a balance of powers by granting certain powers to the MNAA while not expressly precluding certain powers of the creating and participating municipalities.

The Act gives the MNAA “all powers necessary” to accomplish the purposes of the Act except for the power to levy and collect taxes and special assessments. Tenn. Code Ann. § 42-4-107 (2000). The purposes of the Act and of any authority created pursuant to the Act are clearly defined as “the acquiring, operating and financing of airports and related facilities.” Tenn. Code Ann. § 42-4-102(a) (2000). Thus, pursuant to the Act, the MNAA has been granted the powers necessary to carry out these public and governmental purposes. Section 42-4-114 addresses the reach of the powers granted under the Act and provides that:

- (a) The powers conferred by this chapter are in addition and supplemental to the powers conferred by any other law, and are not in substitution for such powers, and the limitations imposed by this chapter shall not affect such powers.

(b) The powers herein granted may be exercised without regard to requirements, restrictions or procedural provisions contained in any other law or charter, except as herein expressly provided.

Thus, Section 42-4-114(b) provides that any general or specific power granted to the MNAA by the Act to accomplish its public purpose can be exercised by the MNAA without having to comply with the requirements, restrictions or procedural provisions of Metro concerning such powers. However, to read Section 42-4-114(b) as precluding Metro from exercising its own power of audit oversight is to read that provision more broadly than appears to have been intended.

The Act in Section 42-4-107(17) grants the MNAA the specific power to “[d]esignate an independent certified public accounting firm to do an annual post audit of all books, accounts and records of the authority and issue a public report on such books, accounts and records.” This provision specifically states that the MNAA has the power to commission an audit of its books and records. This provision, however, does not provide that this is the only audit that can take place and does not preclude Metro from exercising the same power. The MNAA can conduct its own audit if it wishes and is not subject to the “requirements, restrictions or procedural provisions” of Metro in doing so. Tenn. Code Ann. § 42-4-114(b) (2000). Thus, the MNAA would be unrestricted in choosing the accounting firm to conduct the audit and would not have to subject this expenditure to any approval or appropriations process through Metro. But just because Metro cannot restrict the MNAA in regard to an audit the MNAA chooses to conduct on itself, the MNAA cannot restrict Metro’s ability to conduct its own audit of the MNAA pursuant to its charter and to Code Section 6-56-105.

Subjecting the MNAA to audit by Metro is not subjecting the MNAA to the “requirements, restrictions or procedural provisions” referred to in Tenn. Code Ann. § 42-1-114(b) since that section applies only to ensure the unrestricted exercise of powers granted under the Act. The Act does not give the MNAA the sole power to audit itself or the power to prevent audit oversight by the creating and participating municipalities. The Act does give the MNAA “all powers necessary” to accomplish its public purposes of “acquiring, operating and financing” airports and related facilities. Tenn. Code Ann. § 42-4-107 (2000); Tenn. Code Ann. § 42-4-102(a) (2000). Those public purposes are not restricted by allowing Metro to audit the MNAA. Having Metro conduct an audit may be an inconvenience and require a great deal of time and effort on behalf of the MNAA, but such an audit is not a substantive restriction on the MNAA’s ability to conduct its operations and thus does not hinder the MNAA’s ability to accomplish its public purposes as set forth in the Act.

This Office has previously opined that Tenn. Code Ann. § 42-4-114(b) does preclude the application of certain laws to airport authorities created under the Act, if those laws are substantive restrictions on the powers granted to those authorities to accomplish their public purposes of acquiring, operating or financing airports. In *Op. Tenn. Att’y Gen. 84-270* (Sept. 24, 1984), we opined that the Memphis-Shelby County Airport Authority was not required to follow contract bidding requirements

contained in the Shelby County Restructure Act when acquiring equipment and other physical properties because the authority had been specifically given that power under the Act. In *Op. Tenn. Att’y Gen. 88-27* (Feb. 2, 1988), we opined that the MNAA was not required to give preference to blind vendors pursuant to state law when the Authority had been given the specific power to contract with vendors in the Act.

But Tenn. Code Ann. § 42-4-114(b) does not preclude the application of all laws to such authorities, only those that restrict the authorities’ ability to exercise the powers granted under the Act. If one were to read Tenn. Code Ann. § 42-4-114(b) as exempting the MNAA from any law granting audit oversight of the MNAA, then that section would preclude any other agency, including the Comptroller, from auditing the MNAA. Section 42-4-114(b) states that the powers granted to the MNAA in the Act may be exercised “without regard to requirements, restrictions or procedural provisions contained in any other law or charter, except as herein expressly provided.” Based on that language, one could logically assert that if the MNAA is not subject to audit by Metro under its charter and through Tenn. Code Ann. § 6-56-105 because it cannot be restricted by “any other law or charter,” then the MNAA would also not be subject to audit by the Comptroller pursuant to state law. The MNAA derives its powers from state statutes and is certainly subject to state audit oversight; thus the assertion that the MNAA is not subject to “any other law” requiring such oversight is inconsistent with the apparent intent of the Act.

It is apparent from the Act that the General Assembly did intend to make all metropolitan airport authorities created pursuant to those statutes, including the MNAA, entities that operate with a great degree of independence in carrying out their public purposes. Yet, in spite of the autonomous functioning of the MNAA and reasonable legal arguments to the contrary, our Office cannot escape the simple proposition that Metro has the authority to audit all of its agencies. Metro has this authority not only through §§ 6.15 and 8.103(g) of its charter, but also pursuant to Tenn. Code Ann. § 6-56-105(a). Thus, while the MNAA may have been created to operate independently, it is still an agency of Metro, and is still subject to audit oversight by Metro Government.

It is important to note that both Tenn. Code Ann. § 6-56-105 and the Metro Charter do not require that Metro undertake any audit of the MNAA itself. Both authorities provide a method for substituting independent audits for audits performed by Metro in §§ 6-56-105(a)-(c) and § 6.15 respectively.

In response to your second question, the MNAA is subject to audit by other governmental agencies in addition to Metro. The MNAA is subject to audit by the Comptroller of the Treasury of the State of Tennessee, the Tennessee Department of Transportation and the Federal Aviation Administration if certain conditions are met.

The Comptroller has the authority to audit the MNAA as an agency charged with public funds, as a political subdivision, and as a recipient of federal grants through the State of Tennessee within the meaning of the statutes cited. Tenn. Code Ann. § 8-4-109(a)(2) (1993); Tenn. Code Ann. § 9-3-211 (1999);

Tenn. Code Ann. § 9-3-212 (1999); Tenn. Code Ann. § 4-3-304(8) (1998); *See Op. Tenn. Att’y Gen.* 89-102 (Aug. 16, 1989). As a practical matter, only one audit must be conducted to satisfy the Comptroller’s audit requirements because each statute allows the MNAA to file an audit performed by an independent certified public accountant approved by the Comptroller. Tenn. Code Ann. § 9-3-212(a).

If the MNAA were to receive funds under the “TDLA Airport Loan Act,” it would be required to “cause an annual audit to be made” and to furnish a copy of such audit to the Comptroller until any loan made under that act was repaid in full. Tenn. Code Ann. § 4-31-606(b)(2)(D) (1998). The Department of Transportation is also “charged with the express duty of auditing the books of any municipality or airport authority which receives any of the funds appropriated or allocated by the state” as necessary to determine that such funds are being used solely for airport purposes. Tenn. Code Ann. § 42-2-222 (2000).

The records of the MNAA are also subject to audit by the Comptroller of the United States under the Single Audit Act if the MNAA expends over \$300,000 of federal grant money per fiscal year, or any amount set by the Director of the Office of Management and Budget (OMB). 31 U.S.C. §§ 7501, *et seq.* Pursuant to that Act, the MNAA is required to file an audit with the Director of the OMB that is conducted by an “independent auditor” as defined in the statute and make such an audit available for public inspection. 31 U.S.C. § 7502(c), (h). If the MNAA receives federal grants for airport development, it must include as a part of the audit required by the Single Audit Act, a review and opinion of its funding activities with respect to the airport or airports that are the subjects of the grant. 49 U.S.C. § 47107(m).

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